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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/553,678	09/28/2006	LeRoy A. Parker JR.	133110-01US	1841
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BUTZEL LONG				
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ANN ARBOR, MI 48104				
EXAMINER				
TRAN LIEN, THUY				
ART UNIT		PAPER NUMBER		
1794				
NOTIFICATION DATE		DELIVERY MODE		
07/06/2009		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patent@butzel.com  
boudrie@butzel.com

# Office Action Summary

**Application No.**

10/553,678

**Applicant(s)**

PARKER, LEROY A.

**Examiner**

Lien T. Tran

**Art Unit**

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 02 March 2009.  
2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.  
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-17 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.  
6) ☒ Claim(s) 1-17 is/are rejected.  
7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.  
8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.  
10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)  
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3) ☐ Information Disclosure Statement(s) (PTO/SF/ICE)  
Paper No(s)/Mail Date \_\_\_\_\_  
4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_  
5) ☐ Notice of Informal Patent Application  
6) ☐ Other: \_\_\_\_\_

Claims 1-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Parker in view Trout.

Parker discloses a method of forming a taco chip. The method comprises providing grain component such as masa harina, salt, water and shortening, heating the shortening and mixing it with the masa harina, salt and water to form a mixture, forming the mixture into a ball, flattening the ball into a disc, cutting the disc into selected shapes and heating the shapes to form chips. ( see col. 2 line 43 through col. 3 line 25)

Parker does not disclose applying a jerked meat and cheese to a first chip and placing a second chip on top of the meat and cheese, the amount of meat and cheese and the size of the chip.

Trout et al disclose a lipid-based fillings. The fillings can contain cheese, egg, meat pieces etc... The filling is used in snack foods such as tortilla sandwiches or potato crisp sandwiches, comprising two chips which sandwich a filling. ( see col. 9 lines 55-58, col. 7 lines 5-10)

The limiting of claims 1 and 9 and new claim 13 to " consisting of" does not define over the combination of prior art because Parker teaches to make the chip with the processing steps as claimed. The use of the chips to make a sandwich in view of the teaching of Trout et al would encompass the sequence of steps as claimed. The concept of forming a chip sandwich in which a filling is sandwiched between two chips is known in the art as shown by Trout et al. Thus, it would have been obvious to one skilled in the art to form a chip sandwich as taught by Trout et al in the Parker process to form different food product having different flavor, taste and texture. While

the filling of Trout et al is not the same as claimed, the combining of meat and cheese product in corn chip product is notoriously well known, such as taco, burrito, enchilada. Thus, it would have been obvious to one skilled in the art to use any filling such as meat, lettuce in addition to the cheese filling disclosed by Trout et al depending on the taste desired. This would have been an obvious matter of choice. It would have been obvious to use any amount of filling depending on the quantity of filling wanted in the product. It would have been obvious to one skilled in the art to make the chips in any size desired. The size can vary and its selection would have been an obvious matter of reference. It would have been obvious to make more than one layer of cheese as an obvious matter of preference when desiring additional cheese flavor and the layering configuration.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-17 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-11 of copending Application No. 11/184442. Although the conflicting claims are not identical, they are not patentably distinct from each other because both are directed to a method of making a food product comprising a pair of chip with meat and cheese filling in between. The differences reside in the use of a spreadable cheese and pressing of chips together in the co-pending application. It would have been obvious to use a spreadable cheese when desiring a soft cheese such as cream cheese. This would have been an obvious matter of preference. It would have been obvious to press the chips together when desiring to prevent the filling from falling out. This would have been readily apparent to one skilled in the art.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

In the response filed 3/2/09, applicant argues in both Parker and Trout food article, the meat is commingled with other ingredients and the independent meat flavor is lost. This argument is not persuasive. There is no indication in Trout that the meat will be commingled when meat is used to make a chip sandwich. Trout teaches to make a chip sandwich by sandwiching a filling between two chips. When meat is desired in the chip sandwich, it would have been obvious to place it on the filling if it is desired to have the meat shown and to have the distinct taste of the meat. The concept of layering different types of filling in a sandwich is not new; in fact, it is a common practice. The desirability does not have to be explicitly recited in the art; it can be

suggested from what is known in the art and the preference of the individual consumer. Food products having distinct layers are common in the art. For example, in a typical sandwich, there are layers of meat, cheese, condiment and vegetable. In a pizza, there are distinct layers of dough, sauce, cheese, meat. In a nacho, there are chips and the meat and cheese layered on top of the chips. Thus, the concept of making a chip sandwich such that the different foods do not commingle would have been readily apparent to one skilled in the art. Furthermore, the products that are being pressed together are chips. It would have been readily apparent to one skilled in the art that the chips have to be pressed slightly or else they will break. Chips are a fragile product; they are not flexible to allow for much pressing. The issue of having multiple layers of cheese is addressed in the rejection.

Applicant does not make any argument against the double patenting rejection.

Applicant's arguments filed 3/2/09 have been fully considered but they are not persuasive.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T. Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks, can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

July 1, 2009

/Lien T Tran/

Primary Examiner, Art Unit 1794

Application/Control Number: 10/553,678  
Art Unit: 1794

Page 7